(1)

Supreme Court, U.S.
FILED

No. _____

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANNY VAUGHAN,
Petitioner,

v.

FIRST NATIONAL BANK of
SHAMROCK, TEXAS, et. al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

A bankruptcy court *sua sponte* modified the stay provided for by 11 U.S.C. §362, in a case commenced under chapter 7 of the Bankruptcy Act, at a *ex parte* hearing conducted with no attempt to notice the debtor. The questions presented are:

1. Whether a bankruptcy court can modify the automatic stay without affording the debtor the opportunity to be heard?

2. Whether a court of appeals and a district court's refusal to recognize violation of the due process clause of the Fifth Amendment on a record barren of any evidence of notice, constitutes due process denials by Government sufficient to call for an exercise of this Court's power of supervision?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were petitioner Danny Vaughan and respondents: First National Bank of Shamrock, TX, James C. Fling, Belinda Seay, Phillip Pendleton, First Bank and Trust of Shamrock, TX, Kenneth Fields, Waters Holt & Fields, Amarillo National Bank, Crabileigh Vaughan, D. Craig Shew, Smith Shew & Scrivner, P.C., Richard Bird, Bird & Bird, Great Plains Breeders Service, Inc., E. Byron Range, Jr., First National Bank of Wheeler, TX, Winstead Sechrest & Minick P.C., Beverly E. Landis, Taurus Breeders Service, Inc., Ben Westlund, Randy Camp, Moore Camp & Co., CPA's, Doug Mills, Jr., William and Edith Carr, Doug and Gertie Mills, Mitchell and Rose Wong, Perry and Sidney White, Wayne and Imogene Cudd, Morris Westland, Edith Young, Mike Mordy, Mordy & Mordy, Inc. Stan Comer, First National Bank of Pampa, TX, Marshall O. Pence, Barbara Pence, First Community Bank of Lone Grove, OK., and Jack Banner.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANNY VAUGHAN, *Petitioner,*

v.

FIRST NATIONAL BANK of
SHAMROCK, TX., et. al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Danny Vaughan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on December 23, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported, and reprinted in the Appendix ("App.") *infra* at A-1 - A-4 (cited herein as "Opinion, App.-___"). The Tenth Circuit's January 10, 1994

Order denying petitioner's timely petition for rehearing is reprinted at App. A-5.

The district court's Order (Frank H. Seay, United States District Judge) denied petitioner's bankruptcy appeal (reprinted at App. A-6 - A-8) and affirmed the bankruptcy court's Order (James E. Ryan, United States Bankruptcy Judge; reprinted at App. A-10 - A-12) of July 15, 1992, dismissing petitioner's adversary complaint.

JURISDICTION

Petitioner's adversary proceeding filed in the United States Bankruptcy Court for the Eastern District of Oklahoma invoked the court's jurisdiction under 28 U.S.C. §157(a).

Petitioner timely appealed the bankruptcy court's denial of his claim for damages for the willful violation of the automatic stay provided by 11 U.S.C. §362(h). Under 28 U.S.C. §158(a) the United States District Court for the Eastern District of Oklahoma entered its order affirming the bankruptcy court's ruling, and Petitioner timely appealed the district court's order to the United States Court of Appeals for the Tenth Circuit.

On December 23, 1993, the Tenth Circuit affirmed the district court under 28 U.S.C. §158(d). On January 10, 1994

the Tenth Circuit entered its order denying petitioner's timely petition for rehearing.

This court has jurisdiction to review the judgment of the Tenth Circuit under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person * * * nor be deprived of life, liberty, or property, without due process of law; * * * ."

The statute providing for an automatic stay in bankruptcy, 11 U.S.C. §362(a) reads in pertinent part as follows:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities * * *

The statute describing the situations in which the Government may modify the bankruptcy stay, 11 U.S.C. §362 (d) reads in pertinent part as follows:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if —
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. §362(h), dealing with stay violations, provides as follows:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including cost and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

STATEMENT OF THE CASE

Petitioner ("Debtor") commenced a case under Chapter 7, Section 301 of Title 11 of the United States Code on October 5, 1990 in the United States Bankruptcy Court for the Eastern District of Oklahoma ("Bankruptcy Court"). As required by 11 U.S.C. §341, a meeting of creditors was properly conducted. In December, 1990 petitioner's non-debtor, estranged wife, respondent Crabileigh Vaughan ("Wife"), filed an amendment to the Debtor's list of exempt property. Respondent, First National Bank of Shamrock, Texas ("Bank") filed the only timely exception to discharge claiming that the Bank had been defrauded by the Debtor. An answer was timely filed on behalf of the Debtor to the Bank's objection to discharge, and both the appointed chapter 7 trustee and the Bank filed an objection to the Wife's amendment to the Debtor's list of exempt property.

The Clerk of the United States Bankruptcy Court for the Eastern District of Oklahoma ("Clerk") mailed a notice of a hearing set for January 23, 1991 to consider the objections of the trustee and the Bank to the Wife's amendment; however, the Clerk, six days prior to the date set for the hearing, mailed a notice of the continuance of this hearing until a future date that was to be provided to the interested

parties by the Clerk when reset by the Bankruptcy Court. No subsequent notice was provided to the potentially interested parties to the case, including the debtor.

In November, 1991, petitioner obtained information that led to his discovery that the Bankruptcy Court had entered an order that was not distributed to the parties in interest by the Clerk, which indicated that the Bankruptcy Court *sua sponte* modified the automatic stay, at a hearing on January 30, 1991 attended by counsel for the Bank, counsel for the Wife, and the trustee, for the purpose of allowing a Texas divorce court to divide the community estate of the Debtor and his estranged wife, thus indirectly defining the property of the estate in bankruptcy. The Debtor (petitioner herein) also discovered that a *ex parte* divorce proceeding had been concluded in Texas without proper notice to this petitioner, in which the Wife was awarded the community assets, and that the Bank had obtained a judgment, as a recent intervenor in the Texas divorce action, on issues identical to those in the adversary proceeding initiated by the Bank in the bankruptcy case, objecting to the discharge. The Bank, by virtue of the *ex parte* state court judgment, had received a favorable judgment on a motion for summary judgment in its adversary proceeding in the bankruptcy case, imposing

a non-dischargable debt in excess of $500,000 on this Debtor. Each of the foregoing events occurred without any active participation by the Debtor.

Petitioner (Danny Vaughan), originated this case upon the filing, on his own behalf, a verified complaint as an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Oklahoma (Bankruptcy Court) complaining of respondents conspiracy in the (1) violation of petitioners civil rights pursuant to 42 U.S.C. §1983; (2) violation of petitioner's constitutional rights as guaranteed by the Constitution of the United States; (3) malpractice; (4) fraud; (5) deprivation of equal protection the law; and (6) violation of 11 U.S.C. §362(h), seeking damages for willful violation of the automatic stay.

The Bankruptcy Court entered its order, upon independent review, determining that petitioner's first five actions were non-core, and as such, the Bankruptcy Court lacked jurisdiction to address the merits of those claims. The Bankruptcy Court did determine, by this independent review, that the stay had been properly modified and dismissed the adversary proceeding. (App.-11).

On petitioner Vaughan's appeals challenging the validity of the stay modification, the District Court stated it was in complete agreement with the Bankruptcy Court's ruling (App.-7), and the Tenth Circuit entered its order and judgment affirming the District Court, and went on to hold that bankruptcy courts may *sua sponte* issue any necessary or appropriate order for the administration of the estate including modifications of the automatic stay, specifically to allow state courts to conclude divorce proceedings (Opinion, App.-3 - App.-4).

The opinion of the panel states:

> "[t]he Bankruptcy Court Clerk then sent notice to Mr. Vaughan and his attorney, advising them of an upcoming hearing on the objections to the Amendment. Neither Mr. Vaughan nor his attorney attended the hearing."(Opinion, App.-2).

implying that petitioner was absent by his own choice, and ignoring the cancellation of the hearing that had been previously noticed by the Clerk. A reference, in a respondent's brief, to the Clerk's notice of hearing was the source of information in the record utilized by the appellate panel to formulate the above statement. This erroneous preface to the Tenth Circuit's discussion of the case was the

only mention of notice in the Opinion. In reaching the foregoing conclusion, the three judge appellate panel either mistakeniy overlooked, misunderstood or simply ignored the indisputable fact that a notice of a hearing was not a part of the record before the Tenth Circuit.

Although Vaughan's petition for rehearing was denied by the panel that rendered the Opinion, that petition brought the Clerk's subsequent cancellation of the notice to the attention of the panel.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT SECURING THE FIFTH AMENDMENT RIGHT TO DUE PROCESS

A.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING NOTICE

It is of widespread public importance that this Court consider the issues here presented so that the lower courts and the public may be guided authoritatively with respect to the constitutional limitations on a bankruptcy court's latitude in the administration of estates in bankruptcy.

Although the assets of the petitioner were defined and distributed by persons acting under color of state law in the Texas *ex parte* divorce proceeding, these persons were only able to act after the stay had been modified. The United States Congress has provided a substantial right by creating a statute (11 U.S.C. §301) which allows a person to voluntarily invoke Federal jurisdiction without adjudication, and receive benefits such as the automatic stay, applicable to all entities, provided by 11 U.S.C. §362(a). A procedure, that specifically requires prior notice, is provided in the statute to properly modify the stay, and when followed, does not offend the principals of due process. 11 U.S.C. §362(d).

In this case, the only possible notice the respondents could suggest to meet the notice requirement of the statute, was a notice for a hearing on objections to an amendment filed by a bankruptcy creditor. Although this hearing was subsequently canceled by the bankruptcy court, and the hearing in which the stay was actually modified occurred on a day different from the date setforth in the notice, the courts below have ruled that the stay was properly modified with this as notice.

The judgments below conflict sharply with the minimum requirements of due process of law as this Court declared in Mullane v. Central Hanover Trust Co., 339 U.S. 306, (1950).

As was emphasized in Mullane, the requirements that parties be notified of proceedings affecting their legally protected interest is obviously a vital corollary to one of the most fundamental requisites of due process - the right to be heard. "This right * * * has little reality or worth unless one is informed that the matter is pending and can choose for himself to appear or default, acquiesce or contest." Schroeder v. City of New York, 371 U.S. 208, 212 (1962). The fact a notice of a hearing specifically concerning, or even suggesting that the a stay was to be modified in this case was never distributed to those in interest is undisputed.

It is submitted that a debtor's rights to the due process guarantee of the Fifth Amendment is at least as important as any other citizen's right to due process, and the proceedings of a bankruptcy court must be consistent, in this regard, with all other courts by making every reasonable effort to issue constitutionally valid decisions. For this reason it is submitted that this case presents a question of public importance, that being the validity of the stay modification, which merits review by this Court.

B.

THE TENTH CIRCUIT'S DECISION IS CONTRARY TO WELL ESTABLISHED PRECEDENTS OF THIS COURT REGARDING THE DUTY OF FEDERAL COURTS TO BE ALERT TO PREVENT THE VIOLATION OF IMPORTANT RIGHTS SECURED BY FEDERAL LAWS

It is elementary that a court must rule on an issue that is before the court on the basis of the record presented. Equally fundamental, is the requirement that the decision maker(s) in judicial proceedings be disinterested and decide the issues on the basis of established law. Any deviation from these basic rules constitutes denials of due process.

From the onset, the petitioner has argued the bankruptcy stay modification was invalid. This argument is consistent with previous rulings in the Tenth Circuit, recognizing that a judgment is void if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process. In re: Four Season Securities Law Litigation, 502 F2d. 834 (10th Cir. 1974), cert. denied, 419 U.S. 1034 (1975).

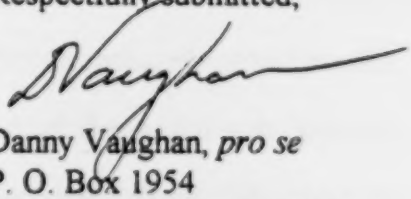
The decisions below focus on the discretionary authority of a bankruptcy court to modify a stay in order to allow state court divorce proceedings to proceed. These statements of law by the lower courts failed to address the issue of the appeal, which clearly was a debtor's challenge to the validity of an order entered in a manner inconsistent with due process which modified the automatic stay.

The Tenth Circuit's opinion based upon its erroneous statement that notice of the hearing modifying the stay had been provided to the debtor and the suggestion that the debtor chose to not attend, none of which was supported by the record before the three judge panel, represents such a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory powers to correct the Tenth Circuit's patent error, and to prevent an injustice from occurring which would render Danny Vaughan's right to due process meaningless.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-7032

Danny Vaughan, Appellant,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Oklahoma
First National Bank of Shamrock, Texas, et al. Appellees.	*	

Entered: December 23, 1993
Before TRACHA, BALDOCK, and KELLY, Circuit Judges.

ORDER AND JUDGMENT *

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R.36.3.

Danny Vaughan appeals from an order of the district court affirming the bankruptcy court's dismissal of his adversary proceeding complaint. We exercise jurisdiction under 28 U.S.C. §158 (d) and affirm.

I. Background

In November 1989, Mr. Vaughan's wife, Crabileigh Vaughan, filed a petition for divorce in Wheeler County, Texas. In October 1990, before the divorce was finalized, Mr. Vaughan filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Oklahoma ("Bankruptcy Court"). Ms. Vaughan, who was not a debtor in the bankruptcy case, filed an Amendment to List of Exempt Property ("the Amendment") asserting that Mr. Vaughan had failed to file a complete list of exempt property. The Bankruptcy Court Clerk then sent notice to Mr. Vaughan and his attorney, advising them of an upcoming hearing on the objections to the Amendment. Neither Mr. Vaughan nor his attorney attended the hearing. In an order dated February 4, 1991, the Bankruptcy Court denied the objections to the Amendment and sua sponte modified the automatic stay of 11 U.S.C. §362 to permit the completion of the pending divorce action in Wheeler County, Texas.

On July 2, 1992, Mr. Vaughan filed an adversary proceeding complaint in the Bankruptcy Court against approximately 130 individuals and entities alleging, among other things, willful violations of the automatic stay. The Bankruptcy Court dismissed Mr. Vaughan's complaint, concluding that the automatic stay had been properly modified by the February 4, 1991 order to permit the conclusion of the pending divorce action in the Texas state court. The United States District Court for the Eastern District of Oklahoma affirmed. Mr. Vaughan now appeals, arguing that his complaint should not have been dismissed because the Bankruptcy Court and the district court erred in holding that the automatic stay was properly modified by the February 4, 1991 order.

II. Discussion

The decision to modify the automatic stay is within the sound discretion of the bankruptcy judge. Pursifull v. Eakin 814 F.2d 1501, 1504 (10th Cir. 1987). We review a judge's decision to lift the automatic stay for an abuse of discretion. Id.

We find that the Bankruptcy Court did not abuse its discretion in sua sponte lifting the automatic stay of 11 U.S.C. §362 to permit the completion of the pending divorce

action in Wheeler County, Texas. Section 105(a) of the Bankruptcy Code allows bankruptcy courts to sua sponte issue any order necessary or appropriate for the administration of the estate including modifications to the automatic stay. See in re Bellucci, 119 B.R. 763, 778-79 (Bankr. E. D. Cal. 1990) (Automatic stay lifted sua sponte to permit state court appeal); In re Laventhol & Horwath, 139 B.R. 109, 116 N.6 (S.D.N.Y. 1992) (bankruptcy court may, if necessary, sua sponte modify the automatic stay in light of the 1986 amendment to 11 U.S.C. §105 (a)). Specifically, bankruptcy courts may lift the automatic stay to allow state courts to conclude divorce proceedings. See, e.g., In re White, 851 F.2d 170, 173 (6th Cir. 1988).

We find the remainder of Mr. Vaughan's arguments meritless. We AFFIRM the district court order affirming the Bankruptcy Court's dismissal of Mr. Vaughan's adversary proceeding complaint. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-7032

Danny Vaughan, Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing
	*	
First National Bank of Shamrock, Texas, et al. Appellees.	*	

Entered January 10, 1994

ORDER

Before TRACHA, BALDOCK, KELLY, Circuit Judges.

This Matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
ROBERT L. HOECKER, CLERK

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Danny Vaughan,
Appellant,

v.

First National Bank of Shamrock, Texas, et al.,
Appellees.

No. CIV-92-526-S

Entered March 31, 1993

ORDER and MEMORANDUM OPINION

The Appellant appeals the Bankruptcy Court's Order of July 15, 1992, wherein that Court, on its own motion, dismissed the appellant's complaint in an associated adversary proceeding. Appellant contends that the Bankruptcy Court's reliance on its Order of February 4, 1991, in the main bankruptcy case, which modified the automatic stay in that bankruptcy case to permit the completion of divorce proceedings involving the appellant in the State Court of Texas, was error.

In its Order of July 15, 1992, the Bankruptcy Court found that:

A. Appellant had initiated his adversary complaint on six bases or causes: (1) violation of appellant's civil rights pursuant to 42 U.S.C. §1983; (2) violations of appellant's constitutional rights; (3) malpractice; (4) fraud;

(5) deprivation of equal protection of the law; and (6) violation of the automatic stay in the bankruptcy case.

B. As a matter of law, the bankruptcy court lacked jurisdiction to adjudicate the first five bases or causes, because they are non-core matters, unrelated to appellant's bankruptcy case.

C. As to the sixth bases, alleged violation of the automatic stay, the automatic stay in the main bankruptcy case to which this adversary proceeding is associated was properly modified on February 4, 1991, to permit the Texas State Court action, appellant's divorce proceeding, to be completed. (Record on Appeal #2).

The only issue in this appeal is part "C" of the above order, the validity of the modification of the automatic stay in the main bankruptcy case on February 4, 1991. In its Order of February 4, 1991, the Bankruptcy Court found "that proper notice was given to all interested parties and that no appearance was entered at the hearing on behalf of the Debtor (appellant)". That Court then "ordered that the Court sua sponte modifies the Automatic Stay to permit the conclusion of the pending divorce action in Wheeler County District Court in Texas." (Record on Appeal #3). The appellant did not appeal the February 4, 1991, Order, nor did he seek relief through Rules 59 and 60 of the Federal Rules of Civil Procedure, as made applicable to bankruptcy proceedings by Rules 9023 and 9024 of the Bankruptcy Rules. Thus, the Bankruptcy Court's Order of February 4,

1991, became, and is , a final, valid order, and appellant cannot circumvent the requirements of Rules 8001 and 8002 by appealing the Bankruptcy Court's subsequent Order of July 15, 1992. Department of Air Force v. Carolina Parachute Corp., 907 F.2d 1469 (4th Cir. 1990); Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Goss v. Goss, 722 F.2d 599 (10th Cir. 1983).

This Court finds that the Bankruptcy Court's Findings of Fact are correct, and that they are not clearly erroneous. Rule 8013, Bankruptcy Rules. This Court finds that it is in complete agreement with the Bankruptcy Court's Conclusions of Law as applied to the facts herein. Further, this Court finds that the Bankruptcy Court did not abuse its discretion in modifying the automatic stay of 11 U.S.C. §362 on February 4, 1991, and was correct in dismissing appellant's adversary complaint. See, Pursifull v. Eakin, 814 F.2d 1501, 1504 (10th Cir. 1987); Hayes v Production Credit Ass'n of the Midlands, 955 F 2.d 49 (10th Cir. 1992), (unpublished, WLCTA10 database).

Accordingly, the Court Finds Appellant's issue without merit and affirms the Bankruptcy Court's Order of July 15, 1992, dismissing appellant's complaint in the adversary proceeding.

IT IS ALL SO ORDERED this 31 day of March, 1993.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE:

Danny Vaughan, d/b/a Shamrock Vet Clinic and Texoma Analytical Lab, Debtor,	*	Case No. 90-71175
	*	Chapter 7
Danny Vaughan, Plaintiff,	*	
v.	*	Adv. No. 92-7037
First National Bank of Shamrock, Texas, et al., Defendants.	*	

Entered July 15, 1992

ORDER

On this 15th day of July, 1992, the Complaint filed in the above-referenced adversary proceeding came before this Court for independent review.

Based upon that review, this court does hereby find that the Plaintiff has initiated this action on six bases: (1) that the Defendants have violated the Plaintiff's civil rights pursuant to 42 U. S. C. §1983; (2) violation of Plaintiff's constitutional rights guaranteed by the Constitution of the United States; (3) malpractice; (4) fraud; (5) deprivation of equal protection

under the law: and (6) violations of 11 U.S.C. §362 (h), seeking damages for violation of the automatic stay.

Plaintiff further requests compensatory, punitive, treble damages, as well as interest, costs of suit, attorney's fees, damages for emotional distress and mental anguish, special and consequential damages and demands a jury trial.

Without addressing the merits of the Plaintiff's action with regard to the first five bases, we are forced to rule as a matter of law that this Court lacks any jurisdiction to adjudicate these matters. These actions are without doubt non-core and unrelated to the Plaintiff's bankruptcy case currently pending in this court. 28 U.S.C. §157 (b).

With regard to the sixth basis; namely, a violation of the automatic stay, we find that said stay was properly modified by Order entered by this Court in the main bankruptcy case to which this adversary is associated on February 4, 1991, to permit the particular Texas State Court action to which the Complaint refers (being a divorce proceeding) to be completed. As such is the case, no damages may be obtained pursuant to 11 U.S.C. §362 (h) for willful violation of that automatic stay.

As a result of these findings and conclusions, this Court finds that the Complaint should be dismissed.

IT IS THEREFORE ORDERED that the above-referenced adversary proceeding be and same is hereby dismissed.

The Clerk is directed to mail a copy of this Order to all parties to this action.

/s/ James E. Ryan
JAMES E. RYAN
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

No. 93-1579

In The

Supreme Court of the United States

October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK OF SHAMROCK, TEXAS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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Attorney for Respondents D. Craig Shew; Smith, Shew & Scrivner, P.C.; Crabileigh Vaughan; and, Great Plains Breeders Service, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Can a bankruptcy court *sua sponte* modify the automatic stay to allow completion of debtor's state court divorce proceeding?

2. Can a debtor collaterally attack a final, appealable bankruptcy order to modify the automatic stay with an adversary complaint filed some seventeen months after the order was entered?

RULE 29.1 STATEMENT

Neither Smith, Shew & Scrivner, P.C., nor Great Plains Breeders Service, Inc., has parent companies or subsidiaries.

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CITATIONS TO ORDERS DELIVERED IN THE COURTS BELOW

The February 4, 1991, Order of the United States Bankruptcy Court for the Eastern District of Oklahoma is not reported. *See*, App. at 1-2.

STATUTORY PROVISIONS

Bankruptcy Code §105(a), 11 U.S.C. §105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

In October of 1990 Petitioner commenced his bankruptcy case in the United States Bankruptcy Court for the Eastern District of Oklahoma ("Bankruptcy Court") as Case No. 90-71175. At the time he filed his bankruptcy case, Petitioner was also a party to a previously filed divorce proceeding in Wheeler County, Texas. During the course of the bankruptcy proceedings, Petitioner's wife, Crabileigh Vaughan, who was not a debtor in the bankruptcy case, filed an Amendment to List of Exempt Property ("the Amendment") asserting that Petitioner had

failed to file a complete list of exempt property. As determined by the Bankruptcy Court, notice of the hearing on the objections which had been filed to the Amendment was provided to all parties in interest, including Petitioner and his attorney, Jimmy L. Veith ("Veith"). App. at 1. In its Order dated February 4, 1991 (the "Order"), the Bankruptcy Court found that despite proper notice to all interested parties, no appearance was entered on behalf of the debtor, and the Court proceeded to *sua sponte* modify the automatic stay to permit the completion of the pending divorce action in Wheeler County, Texas. A copy of the Order was sent to Petitioner's attorney Veith as well as the other parties in interest, but no appellate proceeding was initiated by any party. *Id.* at 2.

In July of 1992, Petitioner filed an adversary complaint in the Bankruptcy Court against approximately 130 parties alleging, *inter alia*, willful violations of the automatic stay. Petitioner's complaint was dismissed by the Bankruptcy Court because the Court concluded that the automatic stay had been properly modified in order to conclude the divorce action in the Texas state court. Petitioner appealed to the United States District Court for the Eastern District of Oklahoma which affirmed the Bankruptcy Court. The Tenth Circuit affirmed the district court and denied the petition for rehearing. Petitioner now seeks certiorari alleging due process violations.

ARGUMENT

I. THE BANKRUPTCY COURT'S SUA SPONTE MODIFICATION OF THE AUTOMATIC STAY WAS PROPER IN ORDER TO CONCLUDE PETITIONER'S DIVORCE PROCEEDING.

A. Notices to Petitioner

Petitioner's arguments revolve around the alleged lack of notice for a hearing on January 30, 1991, where the Bankruptcy Court *sua sponte* modified the automatic stay to permit the conclusion of, and thus the property division in, Petitioner's divorce proceeding. Petitioner goes on to assert that he was deprived of due process because not only was he not given notice of the January 30 hearing, the order from this hearing was not distributed, which in turn resulted in an *ex parte* divorce proceeding which divested Petitioner of his marital property. In addition to going beyond the record, Petitioner substantially misstates the essential facts.

Chronologically, the record in this case begins with the February 4, 1991, Order which resulted from the January 30 hearing. App. at 1. Although Petitioner recognizes " . . . that a court must rule on an issue that is before the court on the basis of the record presented," Petitioner goes outside the record to describe notice of the January 30 hearing. *Petition* at 12. Petitioner makes repeated references to notice of a previous January 23 hearing and a subsequent notice of cancellation, but fails to advise the Court of the Bankruptcy Court Clerk's notice of the January 30 hearing (filed on January 21, 1991) which includes a certificate of mailing to both Petitioner and his attorney, Jimmy L. Veith ("Veith"). *Petition* at 5 and 10. While all of

these specific notices are beyond the record, the record itself does clearly reflect that proper notice was given.

In the Bankruptcy Court's Order of February 4, 1991, it is specifically noted that "[a]fter review and consideration of the above-referenced pleadings, this Court finds that proper notice was given to all interested parties and that no appearance was entered on behalf of the Debtor [Petitioner]." App. at 1. Clearly, Petitioner's statement that "[n]o subsequent notice was provided to the potentially interested parties to the case, including the debtor," not only misleads the Court but is untrue because, aside from the Bankruptcy Court's finding of proper notice, at least three interested parties entered their appearance at the hearing. *Petition* at 6; App. at 1.

Equally erroneous and misleading is Petitioner's statement that " . . . the Bankruptcy Court had entered an order that was not distributed to the parties in interest by the Clerk . . . " *Petition* at 6. Again, the record reflects that the reverse side of the February 4 Order shows the certification of the Bankruptcy Court deputy clerk that a copy of the order was mailed to the parties in interest, including Petitioner's attorney, Veith. App. at 2.

Also, Petitioner makes several references to the *"ex parte"* divorce proceeding in Texas, implying that he once again failed to receive notice of this hearing. *Petition* at 6 and 10. In addition to this being outside the record, Petitioner is misleading the Court by implying that he did not have notice of the divorce proceeding. Petitioner's divorce decree, a certified copy of which was made a part of the bankruptcy proceeding on September 18, 1991, reflects quite a different set of circumstances:

> On this the 29th day of April, 1991, trial on the merits was held in this cause, . . . and the respondent [Danny Vaughan] having duly filed an Answer and being advised of the setting, did not appear, and his attorney of record advised the Court that said attorney *was directed not to participate in the hearing by the respondent* . . . (emphasis supplied)

Thus, while the divorce trial may be described as an *ex parte* proceeding, it was *ex parte* only in the sense that Petitioner instructed his attorney not to participate.

B. The Bankruptcy Court's *sua sponte* Modification of the Automatic Stay.

Since the automatic stay allows a bankruptcy court to retain control over the resolution of all claims pertaining to the debtor and the bankruptcy estate, once Petitioner filed his bankruptcy case the automatic stay effectively limited the power of the Texas divorce court to proceed in the pending divorce action. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). Whether the stay should be modified is within the sound discretion of the bankruptcy judge. *Id.* In addition, Section 105(a) of the Bankruptcy Code allows a bankruptcy court to *sua sponte* issue any order, process or judgment necessary or appropriate to administer the bankruptcy estate including modification of the automatic stay. *In re Bellucci*, 119 B.R. 763, 778-79 (Bankr. E.D. Cal. 1990) (a bankruptcy court may lift the automatic stay *sua sponte*, notwithstanding the language of 11 U.S.C. §362(d) that permits a party in interest to seek such relief).

When Mrs. Vaughan filed her Amendment to List of Exempt Property and other parties in interest raised objections, the Oklahoma Bankruptcy Court was being asked to rule on exemptions for residential and business homesteads, vehicles, and household goods as permitted under Texas law. Rather than make those determinations under unfamiliar Texas community property and exemption law, the Bankruptcy Court properly deferred to the Texas divorce court's expertise on those issues. *In re White*, 851 F.2d 170, 173 (6th Cir. 1988) (the bankruptcy court did not abuse its discretion in lifting the stay to allow the state court divorce action to proceed). Accordingly, the Court of Appeals properly found that the Bankruptcy Court did not abuse its discretion when it *sua sponte* modified the automatic stay to allow Petitioner's divorce action to proceed.

II. THE BANKRUPTCY COURT ORDER OF FEBRUARY 4, 1991, WAS A FINAL, APPEALABLE ORDER AND CANNOT NOW BE COLLATERALLY CHALLENGED WITH DUE PROCESS DEFECTS.

Even assuming *arguendo* that notice of the January 30 hearing was either not sent or was insufficient to advise Petitioner that the automatic stay might be modified or even that the Bankruptcy Court improperly modified the stay on its own motion, Petitioner was given notice of the court's action when the court clerk sent a copy of the February 4 Order to attorney Veith. App. at 2. Since an order granting relief from the automatic stay is a final, appealable order, Petitioner should have appealed the Order had he disagreed with it. *In re American Mariner Industries, Inc.*, 734 F.2d 426, 429 (9th Cir. 1984) (decisions

of the bankruptcy courts granting or denying relief from the automatic stay under section 326(d) are final decisions reviewable by the court of appeals). Instead, Petitioner took no action and now seeks to collaterally attack the Order by urging the Order was defective because of the lack of due process notice. Petitioner's failure to timely appeal the February 4, 1991, Order is fatal to now being able to raise that issue in an adversary complaint filed seventeen months after the Bankruptcy Court entered its Order.

CONCLUSION

The Bankruptcy Court properly modified the automatic stay in order to conclude Petitioner's divorce proceeding. Moreover, in the event the stay was improperly modified, the Bankruptcy Court Order of February 4, 1991, was a final, appealable order and cannot now be collaterally challenged with due process defects. Accordingly, the Petition for a Writ of Certiorari to the United

States Court of Appeals for the Tenth Circuit should be summarily denied.

Respectfully Submitted,

D. Craig Shew; Smith, Shew & Scrivner, P.C.; Crabileigh Vaughan; and, Great Plains Breeders Service, Inc.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
DANNY VAUGHAN	)	Case No. 90-71175
461-02-2515	)	Chapter 7
dba Shamrock Vet Clinic	)	
dba Texhoma Analystical Lab	)	
	)	
Debtor.	)	

ORDER

(Filed Feb. 4, 1991)

On the 30th day of January, 1991, the Objection to Claim of Exemptions filed by First National Bank (Docket Entry #20) and Objection to Amendment to List of Exempt Property filed by the Trustee (Docket Entry #24), came before this Court for hearing. Appearances were entered by James C. Fling on behalf of First National Bank, D. Craig Shew on behalf of Crableigh Vaughn and William Mark Bonney, the Chapter 7 Trustee.

After review and consideration of the above-referenced pleadings, this Court finds that proper notice was given to all interested parties and that no appearance was entered at the hearing on behalf of the Debtor.

IT IS THEREFORE ORDERED that the above-referenced Objections are hereby **DENIED**.

IT IS FURTHER ORDERED that the Court sua sponte modifies the Automatic Stay to permit the conclusion of the pending divorce action in Wheeler County District Court in Texas.

IT IS FURTHER ORDERED that the parties are allowed fifteen (15) days after the final Order is entered in the divorce action in which to renew their Objections.

DATED this 1st day of February, 1991.

/s/ James E. Ryan
JAMES E. RYAN
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

The undersigned clerk of the United States Bankruptcy Court for the Eastern District of Oklahoma, hereby certifies that a copy of the document on which this certificate appears was mailed to all parties in interest herein as required by the Bankruptcy Code and Rules of Bankruptcy Procedure.

DATED: 2-4-91

Fling, Shew, Bonney & Veith
Deputy Clerk
TC

BEST AVAILABLE COPY

FILED
APR 29 1994
OFFICE OF THE CLERK

(3)

No. 93-1579

In The

Supreme Court of the United States

October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK OF SHAMROCK, TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Tenth Circuit Court of Appeals has correctly held that the Bankruptcy Court properly modified the automatic stay to allow Texas State Court divorce proceedings involving the debtor's property to continue?

2. Should this Court grant a writ of certiorari where the Tenth Circuit Court of Appeals has correctly held that Petitioner's allegations of violation of due process to be meritless?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were Petitioner, Danny Vaughan, and the following respondents, many of whom were not listed in Petitioner's writ of certiorari:

Ray D. Anderson, Judge, 9th Adm Reg.; David Cave, Judge Visiting, 9th Adm Reg.; John T. Forbis, Judge, 100th Dist.; Horace A. Ray, Clerk, 115th State District; Paul Topper, Clerk, 31st State Dist.; Terri Wyatt, Court Reporter; F.L. Garrison, Judge, 115th State Dist.; Grainger McIlhany, Judge, 31st Dist.; Ray L. McKim, Judge; Patricia O'Neil, Clerk, 31st State Dist.; Gary Bellis, Process Svr.; Warren Chisum, Tx. State Rep.; Marvin Marshall, 242nd Dist. Judge; R.T. Scales, Judge Visiting, 1st Ad. Reg.; M. Kent Sims, Judge, 31st Dist.; Shirley Fore, Court Reporter; Ruth Whiteside, Court Coordinator; Karen Coleman, Dist. Clerk; David Bishop; James C. Fling; Bishop & Bishop, P.C.; Adkins & Fling; Steven R. Emmert; Jimmy Veith; Bill Spillman; Lyle R. Nelson; Mizner & Nelson, P.C.; Richard D. Bird; Bird & Bird, Richard D. Bird, Agent; D. Craig Shew; Jairl P. Dowell; Smith, Shew & Scrivner, P.C.; Ralph Brock; Phillip Pendleton; Brock, Morton & Pigg, Ralph Brock, Agent; Rudd R. Owen; Wm. F. Russell, P.C.; Day, Owen, Lyle, Voss & Owen; Jeffrey Jones; Jones, Flygare, Galey, Moody & Warton; Aubrey J. Fouts; Travis D. Shelton; Jones, Blaney & Williams; Earl S. Tate; Shelton & Jones; Crenshaw, Dupree & Milam; William R. Moss; Carr, Evans, Fouts & Hunt; Thompson, Cawley, Veasey & Burns; Glen C. Burns; Cheryl Brennan; Walco International, Inc.; Bobby R. Dunn; Mal Brennan; Panhandle Vet.

LIST OF PARTIES – Continued

Supply, Inc.; Crabileigh Vaughan; Janie Troxell; Russell Killingsworth, DVM; Linda Newstead; Barbra Pence; Randolph Waldman, M.D.; Marshall O. Pence; Belinda Seay; White Acres Good Samaritan Village; Doug Mills, Jr.; E.B. Range, Jr., DVM; Reba Hewlett, Ind. U.S. Small Business Adm.; Taurus Breeders Serv. Inc.; Leland Matthews, CPA; Randy Camp, CPA; Moore, Camp & Co., CPA's; First National Bank of Shamrock, Texas; First Bank & Trust; First Community Bank & Trust Co. of Lone Grove; Amarillo National Bank; First National Bank of Wheeler, Texas; National Bank of Commerce; Wellington State Bank; Jeff Andrews; Wise & Kaku Accountancy Corp.; First Equity Management Systems, Inc.; Harold Sanders; Charles E. Sanders; Kenneth W. Fields; Wm. & Edith Carr; Waters, Holt & Fields; Wayne & Imogene Cudd; Doug & Gertie Mills; Perry & Sidney White; Morris Westlund; Mitchell & Rose Wong; Richard & Jane Nall; Edith Young; Jim Bob Nall; David McCoy; Jonny Dee Flitton; John Mann; Mordy & Mordy, Inc.; Mike Mordy; John Inman, P.C.; Charles Darter; Ron Felty; Tyrrell-Bessenbacher Co.; Kent Wallis; First National Bank of Pampa, Texas; Lubbock Choice Computing, Inc.; D.M. Cogdell; Sammy Hale; J.M. "Corky" Garner; James R. Alexander; Harvey L. Morton; The Estate of Ben P. Ayres; Harold H. Pigg; Harold Comer; Great Plains Breeders Ser/Taurus, Inc.; David Cave; Shamrock Vet. Hosp., Inc.; R.T. Scales; F.L. "Tiny" Garrison; Stan Comer.

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No. 93-1579

In The

Supreme Court of the United States

October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK OF SHAMROCK, TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

First National Bank of Shamrock, Texas; First Bank and Trust of Shamrock, Texas; Kenneth Fields; Waters, Holt and Fields; Belinda Seay; Philip E. Pendleton; Charles E. Sanders; Harold Sanders; and James C. Fling, individually and doing business as Adkins & Fling (Respondents), file this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued December 23, 1993, by the United States Court of Appeals for the Tenth Circuit.

In support of this request, Respondents respectfully show the Court as follows:

JURISDICTION

The Court's jurisdiction of the appeal is based on the judgment and opinion of the Tenth Circuit Court of Appeals on December 23, 1993. The Petitioner's petition for rehearing was denied on January 10, 1994. This court has jurisdiction to review the judgment of the Tenth Circuit under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

Petitioner, Danny Vaughan, appeals to the United States Supreme Court from an Order of the United States Court of Appeals for the Tenth Circuit affirming an Order of the United States District Court for the Eastern District of Oklahoma affirming an Order of the Bankruptcy Court for the Eastern District of Oklahoma dismissing the Petitioner's Complaint for lack of subject matter jurisdiction and upon the finding that the automatic stay of 11 U.S.C. Sec. 362(a) had been properly modified pursuant to a prior order of the Bankruptcy Court entered on February 4, 1991. The procedural history of this appeal is as follows:

On July 2, 1992, Petitioner ("Debtor" in the earlier filings) filed his Complaint initiating the adversary proceeding styled *Danny Vaughan v. First National Bank of Shamrock, Texas, et al.*, Adversary No. 92-7037, in the United States Bankruptcy Court for the Eastern District of Oklahoma. The Complaint alleged certain violations of Petitioner's civil rights pursuant to 42 U.S.C. Sec. 1983 (West 1993) and his constitutional rights, malpractice, fraud, deprivation of equal protection under the law, and willful violations of the automatic stay of 11 U.S.C. Sec. 362.

On July 15, 1992, the Honorable James E. Ryan, Bankruptcy Judge for the Eastern District of Oklahoma, upon independent review of the Complaint, *sua sponte* dismissed the Complaint finding that the court lacked jurisdiction to adjudicate the non-core matters unrelated to the Petitioner's bankruptcy case, and that the automatic stay had been properly modified by prior order of the court entered on February 4, 1991.

Petitioner timely filed a Notice of Appeal to the United States District Court for the Eastern District of Oklahoma on July 27, 1992. By order entered on March 31, 1993, the Honorable Frank H. Seay, United States District Judge for the Eastern District of Oklahoma, affirmed the Bankruptcy Court's ruling. The District Court held that because the Petitioner did not appeal the Bankruptcy Court's February 4, 1991 Order, the modification of the automatic stay was final and valid and could not be circumvented by appealing the Bankruptcy Court's subsequent Order of July 15, 1992. The District Court further noted that the Bankruptcy Court did not abuse its discretion in modifying the stay of 11 U.S.C. Sec. 362 on

February 4, 1991. The Petitioner then appealed this ruling to the United States Court of Appeals for the Tenth Circuit on April 12, 1993. The Court of Appeals affirmed this judgment and Petitioner filed his Petition for Writ of Certiorari to this Court.

B. Statement of Facts.

On October 5, 1990, Danny Vaughan d/b/a Shamrock Vet Clinic d/b/a Texoma Analytical Lab filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On December 12, 1990, Crabileigh Vaughan, the non-debtor spouse of Danny Vaughan, filed an Amendment to List of Exempt Property (the "Amendment") asserting that the Debtor had failed to file a complete list of exempt property and attempted to list certain Texas property as exempt. Objections to the Amendment were subsequently filed by the First National Bank of Shamrock, Texas and William M. Bonney, the Chapter 7 Trustee. On January 7, 1991 and January 8, 1991, the Clerk of the United States Bankruptcy Court sent notice that the hearing on the Objections would be held on January 23, 1991 at 10:00 a.m. This hearing was later continued to January 30, 1991 by order dated January 17, 1991. The Objections came on for hearing before the Honorable James E. Ryan on January 30, 1991. Neither Petitioner nor his attorney were present at this hearing although they were properly notified of said hearing.

On February 4, 1991, the Bankruptcy Court entered an order denying the Objections without prejudice and modifying the automatic stay of 11 U.S.C. Sec. 362 *sua sponte* to permit the continuation of a pending divorce

action in Wheeler County District Court, Texas (the "February 4, 1991 Order"). A copy of this Order was mailed to all parties and their attorneys.

On July 2, 1992, Petitioner filed a Complaint initiating the adversary proceeding styled *Danny Vaughan v. First National Bank of Shamrock, Texas, et al.*, Adversary No. 92-7037 in the United States Bankruptcy Court for the Eastern District of Oklahoma. Named as defendants in the Complaint were approximately one hundred thirty (130) individuals and entities, including attorneys, law firms and judges. The Complaint alleged certain violations of the Debtor's civil rights under 42 U.S.C. Sec. 1983 and his constitutional rights, malpractice, fraud, deprivation of equal protection under the law, and willful violations of the automatic stay of 11 U.S.C. Sec. 362.

By order entered on July 15, 1992, Judge Ryan, upon independent review of the Complaint, *sua sponte* dismissed the Complaint finding that the court lacked jurisdiction to adjudicate the non-core matters unrelated to the Petitioner's bankruptcy case, and that the automatic stay had been properly modified by the February 4, 1991 Order. Petitioner appealed the Bankruptcy Court's ruling to the United States District Court for the Eastern District of Oklahoma. The District Court affirmed the Bankruptcy Court's ruling in an Order and Memorandum Opinion entered on March 31, 1993, and Petitioner then appealed this ruling to the United States Court of Appeals for the Tenth Circuit on April 12, 1993. On December 23, 1993, the Court of Appeals for the Tenth Circuit filed its Order and Judgment holding that the modification of the automatic stay was within the sound discretion of the bankruptcy judge and that the remainder of Petitioner's

arguments were meritless and affirmed the district court order affirming the Bankruptcy Court's dismissal of Petitioner's adversary proceeding.

SUMMARY OF ARGUMENT

The Tenth Circuit's order in the present case does not warrant review by this Court. The decision does not conflict with any other circuit court opinion and correctly applies this Court's precedent and applicable law. There is no conflict among the circuit court decisions that the decision to modify the automatic stay provided for upon the filing of a bankruptcy petition is within the sound discretion of the bankruptcy judge. Petitioner's arguments related to his notice or alleged lack thereof are meritless for several reasons. First, Petitioner waived his right to contest the bankruptcy court's modification of the automatic stay because he failed to perfect an appeal from that order after notice thereof. Second, the bankruptcy court did not abuse its discretion in modifying the automatic stay since that decision is within the sound discretion of the bankruptcy judge. Third, the bankruptcy court's *sua sponte* modification of the automatic stay did not violate Petitioner's right to due process, especially since Petitioner had notice of the hearing and notice of the entry or order lifting the automatic stay and chose to do nothing.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE BANKRUPTCY COURT PROPERLY MODIFIED THE AUTOMATIC STAY ON FEBRUARY 4, 1991 TO ALLOW TEXAS STATE COURT DIVORCE PROCEEDINGS INVOLVING PROPERTY TO CONTINUE.

A. Petitioner Waived his Right to Contest the Bankruptcy Court's Modification of the Automatic Stay.

The Bankruptcy Court *sua sponte*[1] modified the automatic stay by Order dated February 4, 1991 to permit the conclusion of Petitioner's pending divorce action in Wheeler County, Texas District Court. Petitioner failed to timely appeal the February 4, 1991 Order in accordance with Bankruptcy Rules 8001 and 8002. Bankruptcy Rule 8001(1) provides in part:

> An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002.

Bankruptcy Rule 8002(a) requires the "notice of appeal . . . be filed with the clerk within 10 days of the entry of the judgment, order, or decree appealed from."

---

[1] The Court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. 11 U.S.C.A. Sec. 105(a) (West 1993).

see also In re Comer, 716 F.2d 168, 172, 9 C.B.C.2d 359 (3rd Cir. 1983). In addition, Bankruptcy Rule 8002(c) allows a bankruptcy judge to extend the time for filing the notice of appeal.

After the February 4, 1991 Order was entered and the stay modified to allow Petitioner's divorce proceedings to continue, Petitioner did not challenge the Bankruptcy Court's ruling as the Bankruptcy Rules require. Moreover, Petitioner failed to request an extension of time under Bankruptcy Rule 8002(c). Instead, Petitioner waited until July 2, 1991, five months later, to file an adversary proceeding against every creditor, attorney, and judge he has had contact with alleging violations of the automatic stay and deprivation of his rights. Because Petitioner failed to timely perfect his appeal, the Bankruptcy Court's Order of February 4, 1991, became a valid, final, non-appealable Order. *See* Bankruptcy Rules 8001, 8002. Petitioner cannot circumvent the requirements of Bankruptcy Rules 8001 and 8002 by appealing the subsequent Order of Dismissal of July 15, 1992. *Department of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990); *see also* Advisory Committee Note to Bankruptcy Rule 8002 ("[i]f a timely Notice of Appeal is not filed, no appeal may be taken later"); *Matter of Thomas*, 67 B.R. 61, 62 (Bankr. M.D. Fla. 1986) (time provisions set forth in Bankruptcy Rule 8002 are to be strictly enforced). Allowing Petitioner to attack the Order of Dismissal of July 15, 1992 would effectively emasculate Bankruptcy Rules 8001 and 8002 and the Bankruptcy Code's underlying theme of efficient administration of a bankrupt's estate. *See id.* Additionally, the Bankruptcy Court entered its final judgment in Adversary Proceeding No. 91-7002

on October 24, 1991, and no appeal was taken from that final judgment, and the Petitioner has again waived any right to complain of any purported errors made in that proceeding. Bankruptcy Rule 8002(a). This would be a collateral attack on a final judgment or order that is regular on its face, and it is not permitted. *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *Acres v. Air Line Pilots Ass'n.*, 390 F.2d 199 (5th Cir. 1968), *cert. den.*, 393 U.S. 852, 89 S.Ct. 28, 21 L.Ed.2d 122 (1968). Additionally, Petitioner feebly attempts to confuse this issue by alleging, for the very first time, that the reason neither he nor his attorney was present at the hearing held on January 30, 1991, was because he had allegedly received a "Notice of Continuance of Hearing," stating that the hearing was to be continued. Whether or not this occurred did not relieve Petitioner of his obligation to timely appeal the *sua sponte* ruling lifting the automatic stay nor of his obligation to have timely appealed the final judgment of the Bankruptcy Court in Adversary Proceeding No. 91-7002 on October 24, 1991, as aforesaid.

B. The Bankruptcy Court did not Abuse its Discretion in Modifying the Automatic Stay.

A judge's decision to lift the automatic stay is within the sound discretion of the bankruptcy judge. *Pursifull v. Eakin,* 814 F.2d 1501, 1504 (10th Cir. 1987). The judge's decision to lift the stay will be reversed on appeal only if the judge has abused his or her discretion. *Id.* On appeal from an order of the bankruptcy court, a district court may affirm, modify, reverse, or amend a judgment or

order of the bankruptcy court. Bankruptcy Rule 8013. However, the district court must accept findings of fact of a bankruptcy court unless they are clearly erroneous. *Id.; Matter of Fowler,* 407 F.Supp. 799, 801 (W.D. Okla. 1975).

Lifting the automatic stay in accordance with 11 U.S.C.A. Sec. 362(d) (West 1993) in this case permitted the Wheeler County, Texas District Court to exercise its limited jurisdiction in the kind of manner that is traditionally exclusively reserved for state divorce courts. *In re White,* 851 F.2d 170, 173 (6th Cir. 1988). In order to effectuate the administration of the bankruptcy estate, bankruptcy courts generally lift the stay to allow divorce proceedings to conclude. *See In Re Johnson,* 51 B.R. 439 (Bankr. E.D. Pa. 1985); *Schultze v. Schultze,* 15 B.R. 106 (Bankr. S.D. Ohio 1981). The Bankruptcy Code does not define a debtor's interest in property; the issue must be decided with reference to relevant state law. *In re White,* 851 F.2d at 173; *cf. Selby v. Ford Motor Co.,* 590 F.2d 642 (6th Cir. 1979) (court looked to Michigan treatment of property rights in deciding bankrupt's interest in trust funds).

With regard to Debtor's Texas divorce proceedings, the Bankruptcy Court acted properly in permitting the divorce court, with expertise in such matters, to decide questions that are an inherent part of the divorce process. *In re White,* 851 F.2d at 173 (finding that bankruptcy court properly deferred to divorce court's greater expertise on question of what property belongs to whom). The Texas divorce court's determination of Petitioner's marital property rights was necessary to the administration of Petitioner's bankruptcy estate in that the divorce court was allowed to define the property of the estate. *See* 11

U.S.C.A. Sec. 541 (West 1993). For these reasons, the District Court's holding that the Bankruptcy Court did not abuse its discretion in modifying the automatic stay of 11 U.S.C.A. Sec. 362 (West 1993) on February 4, 1991, was correct and certainly in conformance with precedent.

C. The Bankruptcy Court's Sua Sponte Modification of the Automatic Stay did not Violate Petitioner's Right to Due Process.

Petitioner claims that the *sua sponte* lifting of the automatic stay allowing Petitioner's Texas divorce proceedings to continue was improper because the action was taken in absence of the Petitioner or his attorney. Petitioner illogically reasons that the right to the stay is protected by the Fifth Amendment to the United States Constitution. Further, Petitioner, erroneously alleges he had no notice of a request for relief from the stay.

There is no constitutional right to a bankruptcy discharge, and the "fresh start" provided for by the Code is a creature of congressional policy. *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989) (*citing U.S. v. Kras*, 409 U.S. 434, 446-47 (1973)). If Petitioner does not have a constitutional right to a discharge, he does not have the inviolate right to the stay as provided in 11 U.S.C.A. Sec. 362 (West 1993). Petitioner bases his due process violation claim on the theory that the stay is a "legally protected interest." But for filing bankruptcy, Petitioner would have no right to such stay. Once Petitioner filed bankruptcy, he subjected himself to the equitable procedures of the Bankruptcy Court. Further, Petitioner subjected himself to the provisions of the Bankruptcy Code. Section 105(a) clearly

gives the Bankruptcy Court the authority to *sua sponte* issue such order necessary and appropriate to carry out the functions of the Bankruptcy Code. In the instant case, the Bankruptcy Court *sua sponte* ordered the modification of the stay because it was necessary to the hearing and to define Petitioner's property (exempt, marital, or otherwise).

The purpose of the automatic stay is to ensure the orderly resolution of all claims and the efficient administration of the bankruptcy estate. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987) (stay allows the federal court to retain control over the resolution of all claims pertaining to the debtor and the bankruptcy estate). Section 362(d) allows the granting of relief from the automatic stay under appropriate circumstances. 11 U.S.C.A. Sec. 362(d) provides, in part:

> On request of a party in interest and after notice under a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, unruling, modifying, or conditioning such stay –
>
> (1) for cause

Section 362(d) must be considered in its proper context. Upon the filing of a bankruptcy petition, the stay automatically prohibits interference with property of the estate. In effect, the stay prevents creditors from grabbing alleged collateral on a first-come-first-serve basis. Thus, the underlying theme of the stay is protection of the estate so that all claims can be properly prioritized. Section 362(d) allows a creditor who has cause to request relief from the stay. When a creditor specifically requests relief from the stay under Sec. 362(d), there should be at

least some notice and hearing "as is appropriate in particular circumstances." 11 U.S.C.A. Secs. 102(1)(A), 362(d) (West 1993). However, the notice and hearing requirements of Sec. 362(d) can be satisfied implicitly. *Pursifull,* 814 F.2d at 1505.

In *Pursifull,* the debtor argued that no request or modification of stay was made by a part in interest and that notice and a hearing were not provided prior to the lifting of the stay. The *Pursifull* court disagreed and found that implicit in the proceedings at hand was a need for the stay to be lifted. *Id.* at 1505. The court stated that pursuant to 11 U.S.C.A. Sec. 102(1)(A) (West 1993), "after notice and a hearing . . . means after such notice as is appropriate in particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." *Id.* The *Pursifull* court found that implicit in the relief sought was a request for the bankruptcy court to allow the resolution of issues in another state court to be completed. *Id.* (motion to abstain from exercising jurisdiction satisfied the procedural requirements for the lifting of the stay). In the instant case, when Petitioner's spouse requested the January 30, 1991 hearing regarding Petitioner's exempt property, it was implicit that Petitioner's marital property rights would be affected. Thus, implicit in the proceedings at hand was the need for the stay to be lifted. Notice of the January 30, 1991 hearing satisfied the requirements as contemplated by *Pursifull. Id.*

In the instant case, the Bankruptcy Court, in accordance with its broad discretion under 11 U.S.C.A. Sec. 105(a) (West 1993), *sua sponte,* permitted modification of the automatic stay to allow divorce proceedings in a

Texas state court to continue during a hearing related to Debtor's exempt property. Section 362(d) and its procedures were inapplicable. *See* 11 U.S.C.A. Sec. 105(a) (West 1993). Nevertheless, the need for modification of the automatic stay to permit Petitioner's divorce proceedings to continue was implicit considering the January 30, 1991 hearing and an inherent requirement of the administration of Petitioner's bankruptcy estate. The Bankruptcy Court so ordered modification of the stay because the definition of Petitioner's marital property rights was at issue in the Texas divorce proceedings. It was essential to the bankruptcy case that the divorce proceedings continue to define Petitioner's marital property interests. Under the circumstances, the notice and hearing requirements, if any, of Sec. 362(d) were inapplicable. Even if Sec. 362(d) notice requirements applied, there was such notice and hearing as appropriate under the circumstances. *See* 11 U.S.C.A. Sec. 102(A) (West 1993).

The issuance of the order allowing modification of the stay was "necessary . . . to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C.A. Sec. 105(a) (West 1993). Petitioner has argued that "[t]he manner in which the stay was modified clearly prohibited any opportunity for objection prior to the action of the court terminating the stay." Petitioner's contention ignores the very purpose of the Bankruptcy Court's Sec. 105 *sua sponte* powers. Petitioner had notice of the hearing in which the stay was modified. Implicit in this notice was a request for relief of the stay. Petitioner chose not to attend the hearing. After the hearing, the Bankruptcy Court entered its February 4, 1991 Order which modified the stay. Petitioner had the right to challenge the Order, but refused to

appeal in accordance with Bankruptcy Rules. In light of the particular circumstances of this case, the Bankruptcy Court properly modified the stay in accordance with its broad discretionary and equitable powers and did not violate Petitioner's rights to due process.

II. CONCLUSION

None of the issues DANNY VAUGHAN presents are of precedential value that warrant review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. The Tenth Circuit meticulously reviewed the facts and law in reaching its conclusions. For these reasons the Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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(4)

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No. 93-1579

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October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK of SHAMROCK, TEXAS, et al.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONER'S REPLY BRIEF

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May 16, 1994

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PETITIONER'S REPLY BRIEF

Respondents' arguments emphasize the public importance of the issues of this petition. A potential denial of the fundamental rights of a debtor, or any citizen similarly situated, must be fairly and fully addressed by the federal courts in order to preserve the few absolute guarantees afforded by the Constitution of the United States.

This reply is in response to the two opposition briefs filed within the time limits set forth in Rule 15.2. Each *Brief in Opposition* was filed by an attorney who participated directly in the hearing in which the stay was modified, and each continue to represent parties that received substantial benefits from this esoteric stay modification and subsequent *ex parte* Texas divorce proceeding.

Respondents persist in going beyond the record to suggest notices. All parties were provided adequate opportunity to designate bankruptcy court documents for the appellate record. Petitioner, as did Respondents, could not identify any notice in the record at the time of filing the original adversary complaint in July 1992, that remotely notified interested parties of the hearing set for January 30, 1991, or documentation to support Respondents' contentions regarding the alleged distribution of the February 4, 1991 order to interested parties purportedly modifying the automatic stay. The record of this case is void of any item to support an argument that due process was afforded to the Petitioner.

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time, an unsigned, rubber stamp impression "Certificate of Mailing", asserting he discovered this indication of notice on the backside of the order. (Opp. Shew 4). This claim is not only outrageous, but contradicts Respondents' previous arguments (compare: Opp. Fling 5) claiming the opportunity to be heard and right to appeal were provided to all parties in interest including this Petitioner. This purported "Certificate of Mailing" suggests the order was only mailed to four lawyers: Fling, Shew, Bonney and Veith. Respondents argue this alleged mailing satisfied due process requirements. Nothing has been presented by Respondents, to demonstrate the waiver of rights by this Petitioner. It has been stated by this Court, for a waiver of constitutional rights in any context must, at the very *least*, be clear. *Fuentes v. Shevin,* 407 U.S. 67, 95 (1972). If the Petitioner has went beyond the record, as alleged by Respondents, it has been to address false and misleading arguments presented by the Respondents.

The introduction of the February 4, 1991 bankruptcy court order (Opp. Shew App.1) provides the opportunity to clearly demonstrate the constitutional invalidity in the text of the order itself. The order identifies the issue to be considered, correctly notes the absence of the Debtor, and states the ruling of the court on the issue before the court.

This order continues to recite the court then "sua sponte" modified the stay, an action, under the existing circumstances at the time, clearly violating the due process clause of Constitutional Amendment V., as well as the procedure detailed in 11 U.S.C. §362(d). Petitioner's claim does not conflict with the intent of Congress in 11 U.S.C. §105(a), as Respondents argue, due to a stated purpose in the specific language of the statute: "to prevent an abuse of process." This statute must not mutate to become a vehicle to avoid providing constitutional entitlements or any other requirements Congress has established in the other sections of the Bankruptcy Code.

I. The Court Should Grant The Petition To Clarify The Due Process Rights Of Debtors In Bankruptcy Proceedings.

Respondents argue that "Petitioner waived his right to contest the Bankruptcy Court's modification of the automatic stay" (Opp. Fling 7) by failing to appeal the order. This conflicts sharply with this Court's traditional insistence that an opportunity for a hearing must be provided before the deprivation at issue takes effect. *Fuentes v. Shevin,* at 82. Obviously, the spontaneous proclamation from the bankruptcy court modifying the stay in the absence of the

Petitioner precluded any opportunity for a prior or concurrent objection, comment or request for a hearing on the bankruptcy court's decision to modify the stay.

Second, Respondents argue that "the bankruptcy court did not abuse its discretion in modifying the automatic stay since that decision is within the sound discretion of the bankruptcy judge" (Opp. Fling 6), and "bankruptcy courts generally lift the stay to allow divorce proceedings to conclude." Opp. Fling 10. Respondents and the courts below cite numerous cases related to discretion of the court in the modification of a stay for divorce proceedings; however, they fail to note, not a single one of these cases involve the loss of the protection of the stay *sua sponte* without specific prior notice and the actual modification occurring in the absence of the debtors or any representative of the debtors as occurred in the instant case.

The Tenth Circuit's ruling in *Pursiful v. Eakin*, 817 F.2d 1501 (10th Cir. 1987) has been the primary authority in the lower courts; However, the courts below have refused to recognize that the *Pursiful* court specifically examined the record and events of the case to insure the fundamental requirements of due process were not violated prior to upholding the stay modification in that case. *Pursiful* at 1506.

Petitioner has been unable to identify any authority supporting Respondent's argument that a judicial official's discretion supersedes Petitioner's rights of due process.

Though the manner of modification of the stay may have been an unintentional error on the part of the bankruptcy judge, the error is of a constitutional dimension because the bankruptcy court was powerless to enter the order without specific prior notice in the absence of the Petitioner. The bankruptcy court's action in modifying the stay represents more than an abuse of discretion or error in the exercise of jurisdiction. This action was an usurpation of power, subjecting the order to collateral attack as void for want of due process. The subsequent acts of opportunistic creditors in the *ex parte* state court proceeding emphasize the necessity of assuring constitutional requirements are met in bankruptcy matters.

Respondents, conceding the modification proceeding could be constitutionally defective, now contend the modification of the stay was "implicit considering the January 30, 1991 hearing and [was] an inherent requirement of the administration of Petitioner's bankruptcy estate" with the notice requirements of 11 U.S.C. §362(d) being inapplicable. Opp. Fling 14. This argument implies the Petitioner could not

have made any impact upon the bankruptcy court's decision to modify the stay had he been noticed and present. This reasoning sharply conflicts with this Court's prior ruling stating "Where a person has been deprived of * * * due process, it is no answer to say that in this particular case due process of law would have led to the same result * * *" (internal quotation omitted). *Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988). Respondents are grasping for justification for the failure to provide Petitioner the required opportunity to disclose his valid reasons for obtaining and his expectation of maintaining federal jurisdiction until such time a proper divorce proceeding could have been conducted absent of state corruption, thereby avoiding the predicable outcome of the creditors' clandestine property distribution following the stay modification in Wheeler County, Texas.

The order of February 4, 1991 modifying the automatic stay is void for want of due process of law, and should be vacated by this Court.

II. The Court Should Grant The Petition In Exercise Of Its Powers Of Supervision To Correct The Tenth Circuit's Refusal To Take Notice Of The Record Of The Case And Vindicate The Denial Of Petitioner's Federal Rights.

The courts below have made incorrect assumptions regarding notice of the January 30, 1991 hearing and the distribution of the February 4, 1991 order to avoid addressing the due process violations evident in the record and on the face of the order that modified the stay. The Tenth Circuit's preface in its opinion regarding the notice to Petitioner of the January 30, 1991 hearing (*Petition*, App. 2.) not only went beyond the record, the panel's preface contradicts the record then before the Tenth Circuit.

Although the appellate courts below needed to look no further than the bankruptcy court order of February 4, 1991 to identify the elementary and fundamental error in the stay modification, each court has carefully circumvented the spontaneous nature of the modification at the *ex parte* hearing that generated the order modifying the stay.

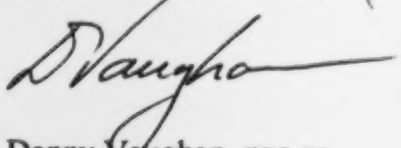
Each refusal to address the due process issues has created added hardship upon a *pro se* debtor now pursuing the only remaining remedy available, to obtain the discretionary jurisdiction of this Court, to correct the basic errors of federal officials in providing an improper avenue for creditors to defeat the federal bankruptcy laws under the color of state law. Respondents, with their numerous conflicts of interest, have an obvious need to avoid a proper

bankruptcy proceeding which would expose corruption in the courts of rural Texas. Federal assistance in the concealment of these kangaroo courts is shocking and deserving of an exercise of this Court's powers of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.. Alternatively, the Bankruptcy Court order of February 4, 1991, modifying the stay is void for want of due process and should be summarily vacated by this Court.

Respectfully submitted,



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